MIGRATION POLICY: 2013 PRIORITIES FOR EMPLOYERS WILL CARRY OVER INTO 2014

Throughout 2013, there have been many changes to Australia's skilled migration program. On behalf of resource industry employer's AMMA's consistent message has been that, while the resource industry remains committed to training and up-skilling local workers, skilled migration plays a small but important role in meeting labour sourcing challenges as they arise.

Recent changes which are of great concern to AMMA members mean that that AMMA will continue to be on message in 2014.

The recent changes include the:

- *Migration Amendment (Temporary Sponsored Visas) Act 2013*
- Amendments to the Migration Regulations in relation to the temporary work (skilled) (subclass 457) visa program
- *Migration Amendment (Offshore Resources Activity) Act 2013*
- School fees for WA-based 457 visa workers' children

Throughout 2013, both before and after the Federal election on 7 September, AMMA has called upon the Federal Government to:

- Recognise the small but important role played by temporary skilled migration as one part of the skills shortage puzzle;
- Recognise the numerous benefits that skilled migrants bring to the Australian economy including knowledge transfer, global management capability and contribution to economic growth and tax revenues;
- Recognise the vital need for skilled migrants during the intensive construction phases of projects of national significance to ensure they are delivered on time and on budget;
- Recognise the highly-specialised skill set that many migrants bring to Australia that may not exist domestically;
- Ensure businesses are not subject to unwarranted third-party interference in their recruitment activities;
- Facilitate resource industry employers' timely access to skilled migrants through an efficient visa process which minimises delays and is responsive to changing industry needs;

- Facilitate access to skilled migration through the timely and efficient implementation of umbrella arrangements including enterprise migration agreements, labour agreements or resource-industry specific migration agreements;
- Recognise the unique needs of the resource industry for skilled labour given the industry's use of state of the art machinery, often short lead times for projects and stringent investor requirements; and
- Acknowledge that the resource industry is a high-paying industry which does not seek to exploit foreign workers and should be given higher standing and priority processing in the visa approval process.

For resource industry employers, key problems continue to from the recent changes to the skilled migration program. And the combined effect of the 2013 changes has been additional costs to businesses and lengthier processing times, meaning greater pressure on employers if projects are to be on time and within budget.

In short, AMMA's strong messages to Government in 2013 will continue in 2014.

GENERAL CHANGES SOUGHT

- AMMA seeks a resource industry-wide labour agreement of sorts to facilitate the industry's access to skilled workers.
- The government could ensure that 457 visa applications under any such "umbrella" agreement are fast-tracked as they would be identified as resource industry applications.
- The current eligibility threshold for enterprise migration agreements (EMAs) is that a resource project must have a capital expenditure of at least $2 billion and a peak workforce of at least 1,500 people. AMMA has consistently argued this should be reduced to $1 billion in capital expenditure and a peak workforce of 500. Fair Work Australia has recently adopted the $1 billion project threshold in awarding 'panel' status to two projects to date. This gives major resource projects greater access to the tribunal in order to ensure that industry requirements are being recognised.
- Unfortunately, stipulations are being applied to EMAs that are acting as a disincentive to industry to take up what is currently available. Where industry does attempt to take up the option of an EMA, those attempts were thwarted by measures introduced by the former government. This includes unwarranted third-party intervention in induction procedures and unwarranted scrutiny of employers' legitimate recruitment decisions. This disincentive must be removed or EMAs will cease being of any value to the resource industry at all.

RECENTLY ENACTED AND PROPOSED CHANGES

Several recently-introduced and proposed changes to Australia's skilled migration program are of great concern to AMMA members. In particular, the following recent changes will be extremely detrimental and AMMA would ask the federal government to consider making necessary changes in the following areas.

Migration Amendment (Temporary Sponsored Visas) Act 2013

What the legislation does

- The bulk of this Act took effect on 1 July 2013.
- To complement recent amendments to the Migration Regulations announced in February 2013 (which also took effect on 1 July 2013), the Act enshrines in the Migration Act the sponsorship obligations that are outlined in the Regulations.

- Among other things, the Act makes it clear that a Fair Work inspector is also an inspector for the purposes of the Migration Act and is able to exercise all the powers conferred on inspectors by the Migration Act.

- The Act also provides for enforceable undertakings as an additional enforcement option under the Migration Act where a sponsor has failed to satisfy a sponsorship obligation.

- The Act originally delayed the commencement of the labour market testing requirement it contains until 1 January 2014 to allow sufficient time for implementation by employer sponsors. However, on 08 November 2013, the new federal government proclaimed the labour market testing changes to take effect on **23 November 2013** so they are currently in force.

- Labour market testing means that employers seeking to access the subclass 457 visa program to employ an overseas worker to fill a nominated vacancy in their business must first test the local labour market to ensure there is no suitably qualified and experienced Australian citizen or permanent resident or 'eligible temporary visa holder' readily available to fill that position.

- Labour market testing must occur within twelve (12) months before an application for a business nomination is lodged at the Department of Immigration and Border Protection. Labour market testing requires an employer to provide evidence of attempts to recruit locally such as advertising jobs or attending job fairs.

Key problems with labour market testing

- Labour market testing (LMT) adds an added layer of complexity that in most, if not all cases, adds cost and time to businesses who need an efficient and speedy resolution (at as little cost as possible) to their internal requirements.

- The documentary evidentiary requirements of LMT are quite burdensome. While employers may provide only the mandatory requirements of LMT with business nominations, employers would not want the Department of Immigration & Border Control to consider their LMT efforts as not substantial enough for the purposes of finalising business nomination.

- LMT has the potential of extending the processing time for business nominations and 457 visa applications. Case officers will need to assess the documents provided by employers and make value judgments about whether the documents provided are sufficient. This puts tremendous pressure on employers to keep projects on time and within budget.

Amendments to the Migration Regulations in relation to the temporary work (skilled) (subclass 457) visa program

What the amendments do

- These amendments to the Migration Regulations took effect on 1 July 2013 and are to be read in conjunction with legislative amendments that also took effect on 1 July 2013 (*see entry above*).
- On 23 February 2013, former Minister for Immigration & Citizenship, Brendan O'Connor, announced reforms to the Temporary Work (Skilled) (Subclass 457) Visa program, saying the growth in 457 visas was out of proportion to skill shortages and there was evidence some employers were using 457 visas to discriminate against hiring local workers.
- Under the changes:
    - employers must prove they are not nominating positions where a genuine shortage does not exist (this is known as the labour marketing testing requirement and this change took effect on 23 November 2013);
    - the English language requirements for certain positions have been raised;
    - the enforceability of existing training requirements for businesses that use the program will be strengthened;
    - the market salary exemption will rise from $180,000 to $250,000;
    - on-hire arrangements of 457 visa workers will be restricted;
    - compliance and enforcement powers will be beefed up to stop employers who have routinely abused the 457 system; and
    - stakeholders will be consulted to ensure market rate provisions more effectively protect local employment.
- Under the reforms, the Fair Work Ombudsman (FWO) will strengthen official efforts to deal with rogue employers who misuse 457 visas. The FWO is now empowered to monitor whether visa holders are being paid market rates; and whether the job they are doing matches the job title and description approved in their visas.

Key problems

- The FWO inspectors that have been granted wide-ranging powers to investigate employers and collect documents from businesses to ensure compliance with Migration Regulations should exercise more

discretion in dealing with employers where privacy issues such as access to personal documents are concerned.

- FWO inspectors should give ample time for employers to provide the requested information that demonstrates compliance.

Migration Amendment (Reform of Employer Sanctions) Act 2012

What the changes do

- This Act took effect on 1 June 2013 although it was originally expected to take effect on 1 July 2013.

- The Act contains a significant number of strong measures that amend the Migration Act 1958 to impose significant costs on employers.

- It supplements existing criminal sanctions for employers who knowingly hire illegal workers with non-fault based civil penalties and an infringement notice scheme.

- The penalties apply to businesses and individuals who allow or refer for work an unlawful non-citizen, whether or not they knew the worker was not lawfully allowed to work.

- If employers have made a genuine attempt to check their workers' legality, they will not be penalised under the new laws.

- Fines for infringements can range from up to $3,060 per breach for individuals and up to $15,300 per breach for companies.

- Penalties that apply for engaging workers illegally are up to a maximum of $76,500 for each person found working illegally. Even if a person is not a direct employee, businesses could be committing offences if it participates in any arrangement that see a person working illegally.

- Referring a person for work without appropriate work rights is an offence under the legislation and recruitment consultants can be held liable if a worker does not hold the correct visa.

- The former federal government estimated there were 100,000 people working in Australia illegally.

Key problems

- Employers and employer agents must be educated and encouraged to use of using the Department of Immigration's Visa Entitlement Verification Online (VEVO) system.
- Not all employers or employer agencies are familiar with this system and the Department of immigration must make it simple and easy for

employers and employer agencies to use this system in order to avoid potential liabilities and prosecution.

Migration Amendment (Offshore Resources Activity) Act 2013

- This Act has passed through federal parliament and received Royal Assent but is yet to take effect.
- Upon its commencement, the Act will amend the Migration Act 1958 to deem people who participate in or support an "offshore resources activity" to be in the migration zone where the activity occurs in areas, including state and territory and international waters, off the Australian coastline.
- The amendment is intended to supplement current Migration Act provisions which define, as part of the migration zone, Australian resources installations and Australian sea installations. Accordingly, such people would be required to comply with the Migration Act.
- The Explanatory Memorandum to the Act states that, prior to commencement, a specifically tailored visa pathway is to be developed for offshore resource workers who would become subject to the amended Migration Act; and it is proposed to prescribe the visa conditions in the Migration Regulations 1994.
- The Act will automatically come into effect on 30 June 2014 if the government does not bring it into effect earlier.
- There is expected to be appropriate notice before commencement and suitable transitional provisions put in place. The former Department of Immigration & Citizenship and the former Labor Government are working through the terms of a consultation process for the development of the new visa pathway, which is expected to have offshore and onshore features.
- The legislation is expected to take effect on 29 June 2014 or 30 June 2014.

Key points

Two key requirements for industry in respect of the new visa:

- Certainty – ie legislation that is clear in its application. Since the bill was introduced into Parliament, the resource industry has been asking questions about its intended application (eg, does it apply in the JPDA?, will it apply to delivery voyages to the EEZ of foreign-flagged, foreign-crewed vessels leaving and returned to a foreign port?) These questions are yet to be answered.

- A visa that is consistent with regulation of and practices in the global industry – the new visa would apply to a very small number of people who currently hold a maritime crew visa or equivalent; the new visa should be consistent with these current visas and should not include work conditions as work conditions are regulated already via the international regulation of maritime workers, eg the Maritime Labour Convention 2006.

- The suggestion is for a new visa equivalent to the current visas (MCV, transit visas, etc) via which these workers currently enter Australia and, if relevant, remain here for short periods of time. The legislative object of the Migration Act is to "regulate, in the national interest, the coming into, and presence in, Australia of non-citizens". It is not to regulate the working conditions of those workers. It should be noted that, currently, the Fair Work Act does not regulate foreign workers on foreign-flagged ships operating in the EEZ and above the continental shelf (*Fair Work Ombudsman v Pocomwell*). AMMA has the benefit of legal advice from John Blackburn about these matters.

- Such a visa might mean that the Amendment Act may not need to be amended/repealed as a matter of urgency.

- On 11 December 2013, AMMA is to hold a forum to discuss with its members a number of maritime policy concerns. The effect of the Migration Amendment Act is one of the areas of concern (others relate to the offshore application of the BCIIP Bill and the Navigation Act 2012 and new Marine Orders). AMMA members will be provided with information and their concerns will be collated. APPEA and the Australian Shipowners' Association are to attend also. A policy paper will then be developed and a wider forum held in Perth in February 2014 to follow up on these issues.

- The Department of Immigration and Border Protection (David Wilden, Assistant Secretary, Skilled Migration Branch, DIBP) has invited AMMA to provide it with views about the new visa. On 12 December 2013, Julie Copley and Jules Pedrosa are to meet with David Wilden and Libby Quinn in Canberra.

Key problems

- Employers need certainty as to the intended application of the legislation in respect to areas such as the JDPA, whether it applies to the delivery voyages to the EEZ of foreign-flagged, foreign-crewed vessels leaving and returned to a foreign port.

- Employers request a visa that is consistent with regulation of and practices in the global industry – the new visa would apply to a very

small number of people who currently hold a maritime crew visa or equivalent; the new visa should be consistent with these current visas and should not include work conditions as work conditions are regulated already via the international regulation of maritime workers, eg the Maritime Labour Convention 2006.

School fees for WA-based 457 visa workers' children

Proposed changes

- These changes are now proposed to apply from 2015, having originally been proposed to start in 2014.
- WA Premier Colin Barnett on 17 September 2013 announced that the families of 457 visa holders in Western Australia would have to pay fees to send their children to a government school from 2015.
- From 2015, a tuition fee of $4,000 a year ($1,000 a term) would apply to a family's first child enrolled in the state education system and $2,000 each for second and subsequent children from the same family.
- The premier noted that 457 visa holders in NSW and the ACT paid higher fees than those proposed in WA but had access to some exemptions.
- WA currently has more than 30,000 workers on 457 visas.

Key problems

- Essentially in NSW, the drive behind the school fees was to discourage skilled migrants from coming into NSW or, more specifically, Sydney.
- This was done under the former state Labor government a few years ago when there was so much publicity about Sydney being "overcrowded" and lacking in infrastructure / social services that it could not cope with an influx of skilled migrants to Australia's "city of choice".
- The ACT followed suit, possibly because of NSW pressure on the land-locked territory. So in these two jurisdictions, if a 457 visa holding child is to attend a public school, the educational levy applies.
- The rhetoric is that just like 457 visa workers "taking Australians' jobs", so are their children taking Australian children's places in particular education systems (at least in state public schools). The depiction being suggested is that of the foreign national parents taking Australian jobs and their kids taking Australian positions in the public education system.

- The latest proposals in WA is a state government signal to the federal government that public school education in the state should be for Australian children first (and maybe foreign nationals second).

- It is meant to be a deterrent for 457 visa holders to send their kids to the public schools and instead have them educated at private schools. Hence the similarity of fees when juxtaposed to the per annum fees paid to a private school educational institution.

- The problem with these developments is that the states seem to be unwittingly creating a "class" society, where children are being discriminated on against by the state because of their temporary residence immigration status in Australia.

- Essentially NSW, the ACT and now WA are telling the federal government they want 457 visa holders to educate their kids privately (paying the relevant economic fees) rather than having the Australian taxpayer subsidising education for foreign national children.